SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

71-948

GEORGE F. GIPE, As Guardian for RONALD D. GIPE,
An Incompetent,
Petitioner,

v.

JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife;
VICTOR HEINS and JANE DOE HEINS, his wife;
FRANK C. RAMON and JANE DOE RAMON, his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 23, 1971 denying petitioner relief under the Civil Rights Act (42 USC 1983) for injuries inflicted by police while searching his home for evidence without a warrant, on the sole and only ground that failure to forcibly resist uniformed police officers as they crossed the threshold is a waiver of the protection of the Fourth Amendment.

OPINION BELOW

The opinion of the Court of Appeals has not been reported (Appendix A-1).

JURISDICTION

The opinion of the Court of Appeals was rendered on November 5, 1971. Petitioner timely filed a petition for rehearing, which was denied by order entered December 23, 1971 (Appendix at p. A-5).

The jurisdiction of the District Court is invoked under 42 USC 1983 and 28 USC 1343, and the jurisdiction of this court is invoked under 28 USC 1257 (3).

QUESTION PRESENTED FOR REVIEW

Does failure to forcibly resist uniformed police officers, as they enter a home without a warrant to search for evidence upon which to make an arrest for a misdemeanor, constitute a waiver of the protection of the Fourth Amendment against unreasonable search.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Civil Rights Act, 42 USC 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the constitution and laws, shall be liable to the party injured in any

action at law, suit in equity, or other proper proceedings for redress."

18 USC 3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Article 1, Section 7, Washington State Constitution:

"*Invasion of private affairs or home prohibited.* No person shall be disturbed in his private affairs, or his home invaded without authority of law."

Revised Code of Washington, Section 10.79.040:

"*Search without warrant unlawful.* It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling, house or place or residence without the authority of a search warrant issued upon a complaint as by law provided."

STATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Western District of Washington, Northern Division, under the Civil Rights Act seeking damages in his capacity as General Guardian of his adult mentally incompetent son for injuries and damages received at the hands of police officers who invaded petitioner's home without a warrant in search for evidence to establish the commission of a misdemeanor.

Color of lawful authority required by the Civil Rights Act was the wearing of police uniform to gain entry into the home without a warrant to search for evidence upon which to make an arrest for a violation of a city ordinance

pursuant to the customs and usage of the Seattle Police.

The undisputed evidence is as follows: Respondents, uniformed police officers, were informed by petitioner's neighbor that a disturbance (consisting of noise only) was taking place in petitioner's home—a misdemeanor under a city ordinance. The informer could not identify the persons making the noise. Petitioner was not personally at home at the time. Respondents heard voices emanating from petitioner's home which they considered to be a disturbance within the meaning of the city ordinance. Respondents did not know, and could not ascertain, the identity of the person they considered committing the misdemeanor from outside petitioner's home. The police officers, recognizing it was necessary to enter the home to ferret out the identity of the person causing the disturbance, knocked on the door of petitioner's home seeking admission. The door was opened but no one invited the officers in by word or gesture. The officers still could not see who was making noise so they walked through the open door and on into the house.

This entry, gained by the display and recognition of the authority of police in uniform who were acting pursuant to the custom and usage of Seattle Police Department in ferreting out the violation of a city ordinance, established the "color" required under the Civil Rights Act and is the key issue in this case.

At the time the officers entered no one in the house knew, or had any way of knowing, whether the officers had a proper warrant authorizing them to enter and search the house. The officers testified that as they entered an adjoining room they saw petitioner's ward making the

noise that, in their opinion, constituted the misdemeanor the officers were investigating. Until that moment the officers did not have probable cause to believe petitioner's ward was committing the misdemeanor. At that same moment petitioner's ward asked the officers if they had a warrant. When the officers replied in the negative, petitioner's ward ordered them to leave. The officers refused to leave and petitioner's ward raised his voice in protest to the point where the officers considered that he was creating a disturbance and thus in violation of the misdemeanor ordinance they were investigating. The official written report filed by respondents immediately afterward stated petitioner's ward was arrested because he "refused to listen to officers."

When the officers and the ward reached the yard in front of petitioner's home, a guest came out of petitioner's home and attacked one of the officers. The other officer then strangled petitioner's ward until he was unconscious. The ward was never convicted of any crime arising out of the occurrence.

The trial court refused to submit any issues to the jury on the entry being in violation of the Fourth Amendment, or the statutes of the State of Washington prohibiting unlawful search, but instead instructed the jury that there were no issues of unlawful entry to search for evidence. The trial judge refused to submit a general verdict. The trial court submitted two special interrogatories limiting the jury's consideration to the questions of (1) a breach of peace in the presence of the officers, and (2) whether the officers used excessive force. Neither of these issues were tendered by the pleadings nor requested to be submitted by respondents or petitioner.

The jury found against the petitioner on those questions.

On appeal petitioner contended the District Court should have directed a verdict in petitioner's favor, or at least have submitted the issue of unlawful entry to the jury.

The Court of Appeals refused to grant petitioner a new trial, but affirmed the judgment for the reasons that (1) the officers used no force in entering the home and (2) they encountered no resistance. The Court of Appeals relied upon cases relieving an officer serving a warrant of the duty to give notice of his authority and purpose before breaking into a house, as required by 18 USC 3109, when he merely walks through an open door. This theory was never presented, or even suggested, in the District Court and was not mentioned or suggested in brief or argument by respondents. The theory, that failure to resist a uniformed officer as he enters the home is a waiver of the Constitutional privileges guaranteed by the Fourth Amendment, was injected *sua sponte* by the Court of Appeals for the Ninth Circuit.

REASONS FOR ALLOWANCE OF WRIT

1. For the first time in our history, a court has decreed that unless one uses force and violence to protect his Constitutional rights, he will be denied judicial relief for the violation of those rights, thus abandoning the sacred doctrine that the juridicary has the duty to guarantee our Constitutional rights. The decision of the Court of Appeals is in direct conflict with *United States v. Di Re*, 332 U.S. 581, 92 L.Ed. 210. The sole and only reason given by the Court of Appeals for denying petitioner's relief is summed up in the words of the opinion:

> "[The] officers used no *force* in entering the home. . . . The officers made no demand, nor did they use any *force*. They simply stepped inside the house through the open door and encountered no *resistance* whatsoever." (Emphasis supplied)

Unless the decision of the Circuit Court is promptly struck down, every uniformed officer in our land will be subjected to the threat of lawful forcible resistance every time he crosses a threshold. It is imperative that this court promptly dispel any suggestion that force must be used against uniformed officers to preserve one's Constitutional Rights.

2. The facts of this case relating to unlawful entry in search of evidence are indistinguishable from those of *Johnson v. United States*, 333 U.S. 10 (1948), 68 S.Ct. 367, 92 L.Ed. 436. In both cases the police officers received an informer's tip of a law violation by some unknown person or persons. In *Johnson* the violation was a felony, while in the case at hand the violation was a misdemeanor of the lowest order. In both cases the officers recognized they must gain entry into living quarters to identify the law violator. In *Johnson*, the officers smelled burning opium and knocked on the door and were admitted when they announced they were police officers. In the case at hand the officers heard loud noises and knocked on the door, and the door was opened by someone, who could obviously see that they were police officers by their uniforms. There was no word or gesture of any kind inviting the police officers to enter. The occupants of petitioner's home had no way of knowing whether the police officers were entering pursuant to a proper warrant and, therefore, no effort was made to stop them or resist their entry. Once inside the home, the police officers contend they found the evidence they were searching for, to wit: the identity of the person

committing the misdemeanor. In *Johnson*, the police officers did not know who was committing the felony until they entered the living quarters and found that Ann Johnson was the only person in the room. In both cases, the police did not have probable cause to make an arrest until they had completed their search for the identity of the person committing the crime after entry into the living quarters. Police officers may arrest for a felony on probable cause but not for a misdemeanor. Therefore, the officers here had even less excuse for entering the home to make an arrest. The *Johnson* opinion declared the entry of the police into the living quarters in violation of the Fourth Amendment, and the arrest which followed unlawful. The facts of the two cases cannot be distinguished, the Court of Appeals for the Ninth Circuit has decided a Federal question in direct conflict with the law as pronounced by this court.

Ironically, this case and *Johnson* have more in common than the facts. Both were tried in the same court room; involved the same police department; the same Court of Appeals condoned the unlawful conduct of the police. All that remains to complete the parallel is the reversal of the judgment of the Court of Appeals.

By refusing to follow the mandate of *Johnson*, the Court of Appeals has, in fact, invited this Court to reconsider and reverse *Johnson*. If this Court does not grant certiorari, the decision of the Court of Appeals, followed by the denial of certiorari, will amount to a *sub silento* reversal of *Johnson* and *Di Re*. If *Johnson* is bad law it should be reversed by this Court. If it is good law the Court of Appeals should be reversed. The two decisions cannot both stand as the law.

Petitioner respectfully prays this court issue the writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD D. GIPE, by his Guardian, GEORGE F. GIPE, *Appellant*, v. JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife, *Appellees.*	No. 26,022

[November 5, 1971]

Appeal from the United States District Court
Western District of Washington

Before: HAMLEY and KILKENNY, Circuit Judges, and GOODWIN, District Judge.*

KILKENNY, Circuit Judge:

Appellant prosecuted this action in district court under 42 U.S.C. § 1983 for an alleged violation of his civil rights. The case was tried to a jury and submitted on interrogatories. Based on the answers to the interrogatories, the court dismissed the action.

FACTS

For the purposes of this appeal, we can say that the facts are practically undisputed. In Seattle, Washington, on March 22, 1964, Seattle policemen Dempsey and Heins

*The Honorable Alfred T. Goodwin, United States District Judge for the District of Oregon, sitting by designation.

were on patrol in a prowler car. At approximately 2:30 A.M., they received a radio dispatch in connection with a complaint on a disturbance in the appellant's residence. When they arrived at the scene they heard "loud, profane and obscene language" coming from the Cipe house. Before entering the house, the officers interviewed two people in an automobile in front of the house and a next door neighbor, the source of the complaint. From them it was determined that the yelling and hollering had been emanating from appellant's home for some time. The officers then approached the front door of the home and knocked. At this time the loud noises inside the appellant's residence were continuing. Someone opened the door and immediately stepped behind it. The officers entered the home and stood for a moment and asked who was the owner of the house and suggested that they quiet down. Appellant, then in plain view, continued yelling and asked why the officers were there and who had complained. About this time, he demanded a search warrant. The officers again told him to quiet down or they would have to place him under arrest. There is ample evidence in the record to show that appellant and the other occupants of the house had generously imbibed of intoxicating liquor. When the appellant would not quiet down, the officers placed him under arrest, for a breach of the peace.[1] After Cipe was removed from the house, one Harris, a companion of appellant, jumped on one of the officers, beating him on the head with brass knuckles. Harris was subdued, but appellant continued to struggle. The officers had to "choke out" appellant before he would keep quiet.

1. Ordinance No. 16046 of the City of Seattle prohibits fighting, drunkenness, disorderly conduct, disturbing the peace, and other matters.

CONTENTIONS

We need consider only two of appellant's contentions: (1) that the trial court erred in failing to direct a verdict for appellant, and (2) that the trial court erred in not submitting to the jury the question of whether the officers had unlawfully entered the appellant's residence.

The following interrogatories were submitted to the jury and answered adversely to appellant's claims.

> "(1) Did Ronald Gipe commit a breach of the peace in the presence of Officers Hines [sic] and Dempsey?
>
> Yes
>
> (Yes or No)
>
> (2) Did Officers Hines [sic] and Dempsey use excessive force in making the arrest and/or transferring Ronald Gipe to the police station?
>
> No
>
> (Yes or No)

The undisputed evidence is that the officers used no force in entering the home. They knocked on the door, the door was opened and they peaceably stepped inside. In these circumstances, the entry was lawful. *United States v. Scharf*, 421 F.2d 1239 (9th Cir. 1970); *Reyes v. United States*, 417 F.2d 916 (9th Cir. 1969); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965); *Dickey v. United States*, 332 F.2d 773 (9th Cir. 1964).

Johnson v. United States, 333 U.S. 10 (1948), upon which appellant relies, is not in point. In *Johnson*, the entry to the defendant's living quarters, which was the beginning of a search, was demanded by the officers under color of office. Here, the officers knocked on the door in

the customary manner and the door was opened. The officers made no demand, nor did they then use any force. They simply stepped inside the house through the open door and encountered no resistance whatsoever. After their entry, the appellant committed a breach of the peace in the officers' presence. *Johnson* recognizes the validity of an arrest under such circumstances. *Johnson*, *supra*, p. 15.

The overwhelming weight of the evidence supports the jury's findings that appellant committed a breach of the peace in the presence of the officers and that the officers did not use excessive force in making the arrest or in transferring him to the police station. Appellant was not entitled to a directed verdict, nor was he entitled to have submitted to the jury his contentions that the officers had unlawfully entered his residence.

In the light of the foregoing, we need not reach the appellant's contention on punitive damages.

The judgment of the lower court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RONALD D. GIPE, by his Guardian, GEORGE F. GIPE, *Appellant*, v. JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife, *Appellees.*	No. 26,022

Appeal from the United States District Court
Western District of Washington

ORDER

Before: HAMLEY, KILKENNY and GOODWIN*,
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Alfred T. Goodwin, District Judge for the District of Oregon at time of argument, then sitting by designation.